No. 78-854

In the

Supreme Court of the United States

OCTOBER TERM, 1978

HARRY P. HUTUL,

Plaintiff-Petitioner,

vs.

UNITED STATES OF AMERICA,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Cases

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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on August 28, 1978.

Opinion Below

The Opinion of the Seventh Circuit is reproduced in Appendix "A" infra. The Order of the trial court is reproduced as Appendix "B". This Opinion and Order is not reported.

Jurisdiction

The judgment of the Seventh Circuit was entered on August 28, 1978. No petition for rehearing was filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254.

Questions Presented For Review

1. Whether Petitioner was twice placed in jeopardy in violation of the Fifth Amendment when he was prosecuted in Federal Court after a prior acquittal in the State Court after trial for the same offense.
2. Whether the trial court's mid-trial instruction to the jury that all of the evidence was admitted against all of the defendants was tantamount to a directed verdict of guilty and deprived petitioner of his Sixth Amendment right to trial by jury.
3. Whether the trial court erroneously permitted introduction of statements impeaching two government witnesses and thereby deprived petitioner of his constitutional right to present a defense.
4. Whether petitioner was denied his Sixth Amendment right to confront the witnesses against him when the court admitted certain exhibits prepared by persons who did not testify and could not be cross-examined.

Constitutional Provisions Involved

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This action was brought by petitioner Harry Hutul pursuant to Sec. 2255, Titl· 28, U.S.C., to set aside a judgment of conviction and sentence entered by the United States District Court for the Northern District of Illinois in case No. 64 CR 408 on August 12, 1966. On motion of the government, the petition was dismissed for failure to state a claim upon which relief could be granted. Petitioner appealed from the order dismissing the petition. The Seventh Circuit affirmed the trial court's order.

Petitioner Hutul is a former member of the Illinois Bar who during 1959 represented several individuals in claims for personal injury and lost wages filed as the result of various automobile accidents which were later alleged in both state and federal prosecutions to have been part of a scheme to defraud various insurance companies.

Petitioner was first charged by the Cook County, Illinois, grand jury in Indictment 61-2942 with obtaining money under false pretenses, operating a confidence game and conspiracy to defraud, in violation of Illinois law. Petitioner was acquitted after trial by jury resulted in a verdict of not guilty on July 3, 1962. (R. 1, pp. 1-6)

Subsequently, petitioner and several other individuals were charged by a federal grand jury in the Northern District of Illinois in Case No. 64 CR 408 with conspiracy to defraud insurance companies (18 U.S.C. Sec. 371) and with the substantive offenses of use of the mails in a scheme to defraud the same insurance companies by knowingly making false pretenses and representations. (18 U.S.C. §1341). As stated in the petition for relief

pursuant to §2255, Title 28, U.S.C., the evidence and testimony in the prior state trial which resulted in an acquittal was essentially the same as in the subsequent federal trial although additional witnesses were called in the federal trial. The evidence on each conspiracy charge covered essentially the same period of time and involved the same alleged scheme to defraud. Many of the exhibits and witnesses were the same at both trials. In fact all of the witnesses utilized in the federal court case were listed in the state court case. Most of the accidents relied upon in the state trial were also relied upon in the federal trial, although more details were also relied upon in the federal trial, although more details were testified to in the federal trial. Each case required proof of the same specific intent to defraud. (R. 1, pp. 1-6) (These facts well-pleaded were admitted by the government's motion to dismiss the petition for relief under §2255.)

After trial by jury during May and June of 1966, petitioner was found guilty of conspiracy to defraud (Count 16) and guilty of nine separate substantive counts based upon the six accidents testified to at the trial. (Further evidentiary details are stated in United States v. Hutul, 416 F. 2d 607 (7th Cir. 1969)). Petitioner was sentenced to the custody of the Attorney General of the United States for concurrent terms of 5 years on each count.

On appeal to the Seventh Circuit, petitioner argued that the government was estopped from prosecuting him because he had previously been prosecuted by the State of Illinois on the same set of facts and that the prior acquittal on state charges barred the subsequent federal prosecution by reason of principles of res judicata and collateral estoppel. In rejecting this argument, the court held that the principles of collateral estoppel and res judicata did not apply because the Federal government

was neither the same nor in privity with the State of Illinois, and therefore those principles "do not provide a substitute for the defense of double jeopardy." (416 F. 2d 607, 626). Although petitioner had asserted his reliance in the double jeopardy clause in his reply brief, the court stated in a footnote that:

> "Defendant Hutul does not claim that his Fifth Amendment right against double jeopardy was abridged. Indeed, it is well established that a federal government is not barred by the double jeopardy clause from prosecuting a person for the same acts for which he was previously acquitted in a state court. Bartkus v. Illinois, 359 U.S. 121, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959); Abbate v. United States, 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959)" (416 F.2d 607, 626 fn. 35).

The Seventh Circuit affirmed petitioner's conviction on September 9, 1969 (United States v. Hutul, 416 F. 2d 607 (7th Cir. 1969). A petition for certiorari was denied on January 12, 1970. 396 U.S. 1012 (1970) (petition for rehearing denied, May 4, 1970, 397 U.S. 1081).

Thereafter, while still serving the sentence imposed by the United States District Court, petitioner filed a motion to vacate the conviction pursuant to §2255, Title 28, U.S.C. In his petition it was alleged, *inter alia,* that petitioner's trial and conviction by federal authorities on charges of conspiracy and mail fraud by false pretenses and operation of a confidence game, violated the Fifth Amendment prohibition against being put twice in jeopardy for the same offense. On motion of the government, the petition was dismissed for failure to state a claim upon which relief could be granted.

Petitioner's notice of appeal was filed February 17, 1976 (C. 30). The Seventh Circuit affirmed the trial court's order on August 28, 1978.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS PLACED TWICE IN JEOPARDY WHEN HE WAS PROSECUTED IN THE FEDERAL COURT AFTER A PRIOR ACQUITTAL IN THE STATE COURT FOLLOWING A TRIAL FOR THE SAME OFFENSE.

Petitioner respectfully submits that his subsequent trial and conviction in the federal courts after acquittal in the state courts on essentially the same charge of fraud and conspiracy to defraud violated the Fifth Amendment prohibition against double jeopardy which has been recognized as fundamental to our concept of ordered liberty. *Benton* v. *Maryland,* 395 U.S. 784 (1969).

Petitioner is of course aware that successive state and federal prosecutions have been sanctioned under the "dual sovereignty" theory of double jeopardy advanced by the Supreme Court in *United States* v. *Wheeler,* ..... U.S. ....., 98 S. Ct. 1079 (1978); *Bartkus* v. *Illinois,* 359 U.S. 121 (1959); and *Abbate* v. *United States,* 359 U.S. 187 (1959), but contends that as the result of other decisions, the extension of the doctrine has been severely questioned. (*See, State* v. *Fletcher,* 22 Ohio App. 2d 83, 259 N.E. 2d 146, 152 (Ohio App. 1970). And although we recognize that *Wheeler, Bartkus,* and *Abbate* remain the law, we unhesitatingly urge this Court to hold that the dual sovereignty doctrine no longer permits a federal prosecution after a state *trial* and *acquittal* for the same offense.

As an initial premise we wish to point out that *Wheeler, Bartkus,* nor *Abbate* involved the precise question here presented. In *Bartkus,* defendant had been acquitted in the federal court and was subsequently brought to trial in the state court. Since the double jeopardy clause had not yet been made applicable to the states, the question

presented was solely whether a second prosecution in the state court after acquittal in the federal court violated the Due Process Clause of the Fourteenth Amendment and the Court held that there was no due process violation. In *Abbate,* the question was whether a prior conviction in a state court precluded a subsequent prosecution in the federal court for the same offense and the Court held that a subsequent federal prosecution was not prohibited by the Double Jeopardy Clause.

This case presents the reverse of the factual situation in *Bartkus.* Instead of a prior federal acquittal followed by a state prosecution, this case presents the situation of a prior acquittal in the state courts followed by a subsequent prosecution in the federal courts. The importance of this distinction, of course, is that the precise issue which arises in this case under the Double Jeopardy Clause was not present in *Bartkus.* Although *Bartkus* likewise involved a prior acquittal rather than a prior conviction, *Bartkus* was decided under the Due Process Clause and not under the Fifth Amendment. And since the *Abbate* case, which was decided under the Fifth Amendment, involved not a prior acquittal, but a prior conviction, the precise issue here presented has not been decided under the Fifth Amendment Double Jeopardy Clause.

In *Wheeler,* the defendant had been convicted of a lesser crime (contributing to the delinquency of a minor) in the tribal court, and was therefore indicted in the federal district court for statutory rape arising out of the same incident.

The distinction we urge between a prior *acquittal* and a prior *conviction* is a reasoned distinction not without support. In *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), the Court observed that the Double Jeopardy Clause has been said to consist of three separate constitutional protections:

> "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense." (395 U.S. 711, 717)

It is the first protection that petitioner Hutul seeks and it has in the main been recognized as the most important of the three. As stated by Justice Black in his dissenting opinion in *Bartkus*:

> "One may, I think, infer from the fewness of the cases that retrials after acquittal have been considered particularly obnoxious, worse, even, in the eyes of many, than retrials after convictions." (359 U.S. 121, 162).

Further support for the contention that a prior acquittal should afford a greater protection under the Double Jeopardy Clause than the other two categories is found in *Somerville* v. *Illinois,* 410 U.S. 458 (1973). In *Somerville,* the Court held that the existence of a void indictment created a manifest necessity for declaration of a mistrial over a defense objection and that respondent there was not placed twice in jeopardy when he was subsequently put to trial on a valid indictment charging the same offense. The Court distinguished *United States* v. *Ball,* 163 U.S. 662 (1896), when the Court held that a prior acquittal, even if rendered on a fatally defective indictment, barred subsequent prosecution of the acquitted defendant on the grounds that *Ball* involved a case which had gone to verdict and resulted in an acquittal.

It obviously follows that a person who has been once acquitted is afforded greater protection under the Double Jeopardy Clause than one who has been merely put to trial but the trial did not go to verdict. A similar result should follow here where petitioner was previously acquitted.

Petitioner's argument gains in strength from the erosion of the dual sovereignty concept upon which *Bartkus* and *Abbate* were decided from the initial weakness of the concept.

As noted by the renowned Justice Walter V. Schaefer of the Illinois Supreme Court, both *Bartkus* and *Abbate* have been subjected to "severe criticism by judges and legal scholars as illogical and as a violation of the policy if not the letter of the double jeopardy clause." [Schaefer, "Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe," 58 Cal. L. Rev. 391, 400 (1970) (hereinafter cited as "Schaefer")]. See also, Fischer, "Double Jeopardy, Two Sovereigns and the Intruding Constitution," 28 U. Chi. L. Rev. 591 (1961); Note, "Double Prosecution by State and Federal Governments—Another Exercise in Federalism," 80 Harv. L. Rev. 1538 (1967); Grant, "Successive Prosecution by State and Nation: Common Law and British Empire Companions," 4 U.C.L.A. L. Rev. 1 (1956); Franck, "An International Lawyer Looks at the Bartkus Rule," 34 N.Y.U.L. Rev. 1096 (1959).

In a well reasoned article, a Chicago lawyer, George C. Pontikes, argued that the dual sovereignty concept found no support in the common law and only limited support in the prior decisions of the United States Supreme Court. Pontikes, "Dual Sovereignty and Double Jeopardy: A Critique of *Bartkus* v. *Illinois* and *Abbate* v. *United States*," 14 West Res. L. Rev. 700 (1963) (hereinafter cited "Pontikes"). Several cases were cited which held under the English common law that an acquittal in one jurisdiction barred a prosecution in another. (Pontikes, pp. 704-706); see also, Brandt, "Overruling *Bartkus* and *Abbate*: A New Approach for Double Jeopardy," 11 Washburn L. J. 188 (1972) (hereinafter cited as "Brandt").

And Justice Schaefer has observed that it is a "principle of international law [that] a plea of autrefois acquit or autrefois convict will bar prosecution in one country after a defendant has already been tried for the same offense in another country properly exercising concurrent jurisdiction." Justice Schaefer went on to point out that the United States Supreme Court itself has recognized this principle in a case involving the exercise of concurrent jurisdiction over pirates on the high seas. (Schaefer, p. 401) In the case referred to, *United States* v. *Furlong*, 18 U.S. 86, 5 Wheat. 184 (1820), the Court said:

> "There can be no doubt that the plea of *autrefois acquit* should be good, in any civilized state, though resting on a prosecution instituted in the courts of any other civilized state." (18 U.S. at 87, 5 Wheat. at 195).

And when the Constitution of the United States was promulgated, the First Congress in 1789 rejected an amendment to what later became the Fifth Amendment to the Constitution which would have restricted the Double Jeopardy Clause to federal offenses. [See *Abbate* v. *United States*, 359 U.S. 187, 203-04 (1959) (dissenting opinion)]. Pontikes suggests that it "is possible that this rejection was based on the English common law view that successive state-federal prosecutions for the same offense should be barred." (Pontikes, pp. 705-706)

When *Abbate* was decided, the principal case relied upon was *United States* v. *Lanza*, 260 U.S. 377 (1922), in which the Court held that a prior state conviction did not bar a subsequent prosecution in the federal court. The *Lanza* case, however, has been criticized as badly reasoned and resting upon dicta from cases concerned with the issue of whether federal criminal statutes preempted state court jurisdiction or the same or similar

cases as defined by state law. (See Pontikes, pp. 706-711) Further supporting this contention is the observation of the Court of Appeals of Ohio that:

> "Reliance on *United States* v. *Lanza,* [citation omitted] by the *Bartkus* majority only accentuates doubts about the precedential foundations for the *Bartkus* decision. For, although *Lanza* supports dual sovereignty, successive prosecutions, it relies in turn on the *dicta* in some of eleven Supreme Court precedents, in none of which is the dual sovereignty successive prosecution doctrine essential to decision . . ." (*State* v. *Fletcher,* 259 N.E. 2d at 151, n. 14).

Several commentators have joined the Ohio Court of Appeals in *Fletcher* in concluding that the dual sovereignty approach to Double Jeopardy has been eroded by several subsequent decisions of the Court. See Brandt, pp. 198-203; Note, "Double Jeopardy and the Impact of *Benton* v. *Maryland* on Successive Prosecutions for the Same Offense By the State and Federal Governments," 46 Ind. L. J. 413 (1971); Note, "Successive Prosecutions by Two Sovereigns After *Benton* v. *Maryland,*" 66 N.W. L. Rev. 248 (1971).

The decision of *Benton* v. *Maryland,* 395 U.S. 784 (1969), *Ashe* v. *Swenson,* 397 U.S. 436 (1970), and *Waller* v. *Florida,* 397 U.S. 387 (1970), to name a few, eroded the dual sovereignty concept of *Bartkus* and *Abbate.* (See Schaefer, pp. 398-402). The Bartkus case was predicated upon the view that the Double Jeopardy Clause of the Fourteenth Amendment did not apply to the States, as had been previously decided in *Palko* v. *Connecticut,* 302 U.S. 319 (1937). In *Benton* v. *Maryland,* 395 U.S. 784 (1969), the Court overruled *Palko* and held that the Fifth Amendment Double Jeopardy Clause was fully applicable to the States. The Court observed that "the fundamental

nature of the guarantee against double jeopardy can hardly be doubted" (395 U.S. at 795), and referred to its origins in Greek and Roman times along with its role in the common law of England. The Court held that the validity of petitioner's conviction must be judged "not by the watered-down standard enunciated in *Palko,* but under this Court's interpretation of the Fifth Amendment Double Jeopardy provision." (395 U.S. at 796).

The Court's rejection of the watered-down standard of *Palko,* which had of course been the basis for the Court's decision in *Bartkus,* led the Ohio Court to Appeals in *Fletcher* to hold that the dual sovereignty doctrine no longer would be relied upon to permit successive state and federal prosecutions. In *Fletcher,* the Court considered two cases involving prior prosecutions under the federal bank robbery statute. In one case, the defendant had been *acquitted,* and in the other he had been *convicted* upon a plea of guilty. Both defendants were subsequently indicted under a state statute for robbery of a financial institution. In upholding pleas of former jeopardy under both the state and federal constitutions, the Court ruled principally on *Benton* v. *Maryland* for the proposition that "the rule of *Bartkus* is so enfeebled as to lack all binding force" (259 N.E. 2d at 152) and predicted that it would eventually be overruled by the Supreme Court. (259 N.E. 2d at 153). The Court also stated that the *Abbate* decision as well was clouded by the holding of *Benton* that the Double Jeopardy Clause was "fundamental to the American scheme of justice." (395 U.S. 707, 717) Although recognizing that *Benton* did not specifically address itself to the dual sovereignty doctrine, the Court in *Fletcher* observed that nonetheless "*Bartkus* casts a long shadow that makes it necessary to say that the resolution of the . . . question is in little doubt." (259 N.E. 2d at 150).

Justice Schaefer agreed that after *Benton* the dual sovereignty doctrine has a dubious future:

> "The close division of the Supreme Court in *Bartkus* and *Abbate*, coupled with the subsequent decision in *Benton* v. *Maryland*, which extended the protection against double jeopardy state court actions, requires us to anticipate that the two sovereignties rule may be abandoned." (Schaefer, p. 402).

The conclusion that the Double Jeopardy Clause is now so fundamental that successive state-federal prosecutions should be restricted where the first trial ends in an acquittal finds support in other areas as well. The state of Illinois and at least 15 other states have adopted legislation prohibiting prosecutions of a person in a state court who has already been prosecuted in a federal court for the same offense. (See Brandt, p. 198). The Model Penal Code has a provision barring successive prosecutions in different jurisdictions where the offenses are identical, require the same proof and are from the same transactions. (ALI, Model Penal Code, Sec. 1.10) And the Attorney General of the United States has announced a policy limiting successive state-federal prosecutions and requiring prosecutors to seek permission from the Department of Justice before proceeding to try a person who has already been prosecuted for the same offense in the State courts—a policy which was flagrantly ignored in this case. (See *United States* v. *Hutul*, 416 F. 2d 607, 626)

The dual sovereignty rationale of *Bartkus* and *Abbate* has been undermined by several other recent cases. In *Waller* v. *Florida*, 397 U.S. 387 (1970), the Court rejected the dual sovereignty rationale in the context of successive municipal and state prosecutions. The case prompted Justice Schaefer to ask "whether the concept of dual sovereignty is not an anachronism in the state-federal context." (Schaefer, p. 398).

Two other Supreme Court cases decided after *Bartkus* and *Abbate* were cited by Justice Schaefer as representing "a departure from the dual sovereignty doctrine," (Schaefer, p. 401) In *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), the Court held that a state could not compel a witness to give testimony which could be used against him in a federal prosecution.

Justice Schaefer observed that "in so holding the Court rejected the contention that the state and federal governments were 'separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres,' and that it would be an intolerable interference if one sovereign would immunize a witness against the use of testimony by another." (Schaefer, p. 401) (footnote omitted). Schaefer pointed out that the Court in *Murphy* observed that we are in an age of "cooperative federalism" where "the federal and state governments are waging a united front against many types of criminal activity." (378 U.S. at 55-56) The existence of the united front, of course, undermines the idea thought important in *Abbate* that federal prosecutions would be hindered by application of the Double Jeopardy Clause to successive state-federal prosecutions.

Justice Schaefer also cited *Elkins* v. *United States*, 364 U.S. 206 (1960), in which the Court overturned the "silver platter" doctrine which permitted use in a federal court of evidence obtained in violation of the Fourth Amendment by state law enforcement officers. After observing that the silver platter doctrine "also had its underpinnings in the dual sovereignty theory," Schaefer quoted Justice Stewart's recognition of the "entirely commendable practice of state and federal agents to cooperate with each

other in the investigation and detection of criminal activity."

Justice Stewart also emphasized that from defendant's point of view "it matters not whether his constitutional right has been invaded by a federal agent or a state officer." (364 U.S. 206, 215) This latter observation is particularly significant in view of the dissenting opinion in *Bartkus* that: "If double punishment is what is feared, it hurts no less for two sovereigns to inflict than for one." (364 U.S. at 154) (Black, J. dissenting)

It is, of course, obvious that from petitioner Hutul's point of view, he was in fact placed twice in jeopardy by the successive prosecutions. The rationale of the *Bartkus-Abbate* decision were further undermined by the Court's recognition in *Ashe* v. *Swenson,* 397 U.S. 436 (1970) of the importance of a prior acquittal. In *Ashe,* defendant invoked the doctrine of collateral estoppel to preclude successive prosecutions for robbery of several patrons of a poker game. After having been acquitted of the robbery of one of the participants in the poker game, the Court held Ashe could not constitutionally be tried for the robbery of another participant after the state refined and strengthened its case. The Court held that the federal rule of collateral estoppel was part of the Double Jeopardy Clause which "protects a man who has been acquitted from having to 'run the gauntlet' a second time." (397 U.S. at 446)

Ashe relied upon *Green* v. *United States,* 355 U.S. 184 (1957), where the Court held that a prior acquittal barred a subsequent prosecution for the same offense. In *Green,* the Court made the frequently-quoted observation that:

> ". . . the state with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (355 U.S. 184, 187-188)

The Court in *Ashe* concluded that "after a jury had determined by its verdict that petitioner was not one of the robbers, the state could [not] constitutionally hale him before a new jury to litigate that case again." (397 U.S. 436, 446).

The Seventh Circuit felt compelled to deny relief on the strength of *United States* v. *Wheeler, supra.* The Court ignored the distinction between the prior-acquittal-and-subsequent-conviction cases, deeming it "a difference without legal significance." We disagree. The difference lies in the fact that a failure to impose a bar to subsequent federal prosecution after acquittal is tantamount to a repudiation of the state judicial system. In *Wheeler,* the entire thrust of the Court's opinion is to uplift the Tribal Court.

Petitioner has alleged that the state court jury by its verdict of not guilty determined that petitioner did not have the specific intent to defraud the insurance companies referred to in both cases. In view of the increased protection the Double Jeopardy Clause now affords, it is simply inconceivable for the federal government to hale him before a different jury to relitigate that ultimate issue again. Accordingly, it was error for the Seventh Circuit to affirm the district court's order dismissing the petition for failure to state a claim upon which relief could be granted, and the order of the district court should be

reversed and a hearing should be held at which petitioner can prove the allegations of the petition. In this context we note that under *Ashe,* the district court will have to examine the record of the prior proceeding and determine whether a jury could have grounded its verdict on an issue other than that which petitioner sought to foreclose from consideration in the subsequent proceedings. (397 U.S. at 444) To that end, the district court should be ordered to hold a hearing on the allegations of the petition.

II.

THE TRIAL COURT'S MID-TRIAL INSTRUCTION TO THE JURY THAT ALL OF THE EVIDENCE WAS ADMITTED AGAINST ALL THE DEFENDANTS WAS TANTAMOUNT TO A DIRECTED VERDICT OF GUILTY AND DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

Petitioner respectfully submits that the trial court's instruction to the jury, given on motion of the government at the close of the government's case, that the evidence previously admitted against individual defendants was not admitted against all defendants was tantamount to a directed verdict of guilty and invaded the province of the jury and effectively deprived petitioner of his Sixth Amendment right to trial by jury.

Throughout the government's case, much evidence was received as to individual defendants only and was not and could not be admitted against any other defendant unless it was shown that a conspiracy existed and that the other defendant became a member of the conspiracy. The acts and declarations of co-conspirators, of course, cannot be admitted against any absent defendant unless there is "independent evidence establishing his participation in the conspiracy." *United States* v. *Cerrone,* 452 F. 2d

274, 283 (7th Cir. 1971). A classic statement of the law in found in *Glasser* v. *United States,* 315 U.S. 60 (1941), where the Court, speaking of hearsay declarations of an alleged co-conspirator, said:

> "However, such declarations are admissible over the objections of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. . . Otherwise, hearsay would lift itself by its own" bootstraps to the level of competent evidence. (*Glasser* v. *United States,* 315 U.S. 60, 74-75).

The same principle applies to acts of alleged co-conspirators.

It is for the jury to determine whether or not each individual defendant joined the conspiracy, for if he joined the conspiracy, he is guilty. The case is over. And if it is the law that the acts and declarations of alleged co-conspirators are not admissible against another alleged conspirator unless it is shown by independent evidence that he joined the conspiracy, then for the trial court suddenly to tell the jury that the evidence is now admitted against all defendants is to tell the jury that a conspiracy has been proven. And since the charge is conspiracy, the court has in effect invaded the province of the jury and directed a verdict of guilty.

The Sixth Amendment guarantees to each defendant in a criminal case the right to trial by jury. Unlike the practice in civil cases, "[i]n a criminal case, a court may not order the jury to return a verdict of guilty, no matter how overwhelming the evidence of guilt." (*United States* v. *Spock,* 416 F. 2d 165, 180 (1st Cir. 1969)).

These rules were violated in this case when, at the close of the government's case, the court, over defense objections, granted the government's motion to admit

all the evidence against all the defendants. (Tr. 1879) When the court later instructed the jury that this was proper when a conspiracy has been shown to exist and and that the defendants are shown to be involved in the conspiracy (Tr. 2995-96), it, of course, became apparent to the jury that the court had already determined that a conspiracy existed and that defendants had joined the conspiracy.

By granting the government's motion to admit all the evidence against all the defendants, the court directed the verdict of the jury on the factual issue of whether a conspiracy existed and whether the defendants were involved in that conspiracy, without question, reservation or doubt. The jury was told by the court that a conspiracy did exist, in fact, and that all of the defendants were involved in that conspiracy by admitting in all the evidence against all of the defendants prior to their instructions and the arguments of counsel. There was no decision left for the jury on those issues. By its action in this regard, petitioner submits that the court directed a verdict on all remaining issues or counts, too. Since the court declared that the conspiracy to devise a scheme and artifice to defraud by use of the U. S. Mails and that all the defendants were part of the conspiracy, obviously there was no question but that they all devised a scheme and artifice to defraud, likewise, as part and parcel of their conspiracy to do so.

It is no answer that the court later instructed the jury on the question of conspiracy prior to the time the jury returned to consider its verdict. The instructions given were confusing and contradictory. Although the jury was told that it could consider the statements and acts of co-defendants only if it first found that a conspiracy existed, and that a particular defendant joined the conspiracy,

this instruction was rendered a *nullity* by the court's earlier instruction that all of the evidence was to be admitted against all of the defendants. In view of the earlier instruction, the jury would well conclude that the court had already determined that a conspiracy existed and that all of the defendants had joined the conspiracy. The jury was not able to follow the confusing instructions and was not able to separate the evidence, as demonstrated by the fact that petitioner was found guilty upon the charge which was not even submitted to the jury (Count XIII).

Since the trial court's action in instructing the jury, at the close of the government's case, that all of the evidence was admitted against all of the defendants, amounted to telling the jury that a conspiracy existed and all defendants had joined it, the trial court effectively directed a verdict of and invaded the province of the jury, in violation of petitioner's Sixth Amendment right to trial by jury.

III.

THE TRIAL COURT ERRONEOUSLY PROHIBITED INTRODUCTION OF STATEMENTS IMPEACHING TWO GOVERNMENT WITNESSES AND THEREBY DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

At trial, the witness Vaccarello, an attorney for Allstate Insurance Company, testified that petitioner Hutul was present when he took the deposition of a claimant who used a false name. At trial, Vaccarello identified co-defendant, Basan, as the person who claimed to be a claimant named Schwerdlin. An insurance investigator named Mazzone also testified that Vaccarello had identified a photograph of Basan.

The government tendered to defense counsel, under Sec. 3500, Title 12, U.S.C., a report of Mazzone for use during cross-examination of Vaccarello. As alleged in petitioner Hutul's petition to vacate the sentence, the statement was impeaching because it reported that Vaccarello could not identify Basan.

During the trial, the statements were offered as defense exhibits (Tr. 1964) and the court refused to admit these statements (defendants exhibits 4, 4A, 4B and 24) as impeaching evidence. Government witness Vaccarello's statement to Mazzone, an investigator, was recorded contemporaneously and in a substantially verbatim recital of the interview, and in the alternative, was a memo and report of that interview by that investigating "officer", at least. That statement (defendants exhibit 4, 4A, 4B and 24) was in the verbatim words of Mazzone and that statement was admissible at the very minimum to impeach Mazzone who was called as a Court's witness. The statement was admissible at the minimum as Mazzone's own present recollection, as recorded, at Mazzone's interview with Vaccarello. The statement, in fact, impeached Mazzone. The statement reported that Vaccarello could not surely identify co-defendant Basan or anyone else. Mazzone prejured himself on the witness stand by testifying that Vaccarello made positive identifications and that perjury was erroneously precluded from the record of the trial and from the jury by the Court's error in refusing to admit the statements into evidence. (Tr. 1965).

Although petitioner attempted to raise this issue on direct appeal, which prompted the government to argue in support of its motion to dismiss that petitioner was attempting to relitigate this issue, the question was never properly decided on direct appeal. The Seventh Circuit was apparently led by the government to believe that it

was ruling on the question of whether the statements of these witnesses were producible pursuant to Section 3500. The issue, however, was not whether they were *producible,* but whether they were *admissible* in evidence to impeach the testimony of the witnesses Vaccarello and Mazzone.

By raising this issue in his Section 2255 petition, petitioner is not attempting to "relitigate" this question, but is rather attempting to obtain a ruling on a question which the court avoided in its previous decision. After persuading the Court to rule as it did, the government should not now be permitted to take advantage of the court's failure properly to rule on the issue presented.

Failure of the trial court to permit introduction of the prior statements of the witnesses infringed upon petitioner's constitutional "right to a fair opportunity to defendant against the [government's] accusations." *Chambers* v. *Mississippi,* 410 U.S. 284, 35 L. Ed. 2d at 308 (1973).

IV.

PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN THE COURT ADMITTED CERTAIN EXHIBITS PREPARED BY PERSONS WHO DID NOT TESTIFY AND COULD NOT BE CROSS-EXAMINED.

Petitioner respectfully submits that he was denied his Sixth Amendment right to confront the witnesses against him when various documents prepared by persons who did not testify were admitted in evidence against him at trial. It is, of course, fundamental that under the Sixth Amendment, "The right of cross-examination is included in the right of an accused in a criminal case to confront

the witness against him." *Smith* v. *Illinois,* 390 U.S. 129 (1968); *Pointer* v. *Texas,* 380 U.S. 400, 414 (1965).

Petitioner was denied his right to cross-examine the witnesses against him by the introduction of several exhibits at trial. Government's Exhibit #91 was a sworn interrogatory, part of a set of interrogatories (of which there were two sets) in a civil suit in the United States District Court in Indianapolis, which had no relationship to any of the matters before the court. Although co-defendant Robert J. Sacks, who was the plaintiff in that case, attested to the said interrogatory and petitioner Hutul only notarized Sacks' signature, Sacks never testified at the trial and could not be cross-examined about the document.

One of the questions in the said interrogatories related to the employees of White Vending Company, Inc. Sacks answered all these questions under the guidance and direction of attorney Sherwood Blue, of Indianapolis, who was the plaintiff's counsel in that action. Question 39 related to the number of employees at White Vending Co., Inc., and Sacks answered, on the advice of attorney Blue, that there were four, since the corporation had only four people from whose checks deductions were taken, as per the definition of the word "employee" by the United States Department of Labor. The independent contractors rendering partial services for the firm were not listed in the Sacks answer. The employees named were persons who had knowledge of the transactions between Sacks and the defendant in the said Indianapolis suit.

This document was admitted into evidence in violation of petitioner's rights under the Confrontation Clause. Also, the document was read to the jury by the prosecutor. Sacks' own words were used against him although Sacks

did not take the witness stand (Tr. 1777, 1781). This document could have only been rebutted and explained by Sacks' own testimony, contrary to his obligation or desire to testify in a case where he was a defendant on trial. The use of this Exhibit 91 was proper only for purposes of impeachment of Sacks, but not for any other purpose.

Petitioner was also denied his guaranteed right to confront the witnesses against him by admission into evidence of Exhibits 26, 7B and 7C, the Secretary of State Certifications, all the Police Reports, Bank Statements, Answering Service Records, and the like. Petitioner had absolutely nothing to do with the preparation of any of these documents and of course the documents themselves could not be cross-examined.

The only possible means of rebutting these exhibits was for the co-defendants to take the stand and testify subject to cross-examination by petitioner. Petitioner's rights under the Confrontation Clause were therefore prejudicially and erroneously violated by the trial court's admission of the aforesaid exhibits into evidence.

CONCLUSION

For the reason urged herein, petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, and upon review, that this Court adjudge that the order of the district court dismissing the petition for failure to state a claim upon which relief can be granted be reversed with directions to hold a hearing on the petition.

Respectfully submitted,

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Attorney for Plaintiff-Petitioner,
Harry P. Hutul

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Nos. 78-1015 and 76-1197
HARRY P. HUTUL,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 1179—WILLIAM J. LYNCH, *Judge.*
Argued January 12, 1977 in No. 76-1197 and Resubmitted in No. 78-1015 on February 8, 1978.
Decided August 28, 1978

Before SPRECHER and TONE, *Circuit Judges,* and EAST,* *Senior District Judge.*

PER CURIAM:

The Appeal:

Petitioner-appellant Harry P. Hutul (Hutul) appeals the order of the District Court granting the Government's motion to dismiss Hutul's petition and cause for relief under 28 U.S.C. § 2255 without a hearing. The District Court's order was entered on January 19, 1976 "for

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

failure to state a claim upon which relief can be granted," without further explanation.**

We note jurisdiction under 28 U.S.C. § 1291, and affirm.

The Facts:

Hutul is a former member of the Illinois Bar who during 1959 represented several individuals in claims for personal injury and lost wages filed as the result of six automobile accidents. Later it was alleged in state and federal prosecutions that these claims were part of a scheme to defraud various insurance companies. Hutul was first charged by the Cook County, Illinois, grand jury with the crimes of obtaining money under false pretenses, operating a confidence game and conspiracy to defraud, in violation of Illinois law. He was acquitted by a jury on July 3, 1962. Subsequently, Hutul and several other individuals were charged by a federal grand jury in the Northern District of Illinois with conspiracy to defraud insurance companies, 18 U.S.C. § 371, and with 16 substantive offenses of mail fraud as part of a scheme to defraud the same insurance companies, 18 U.S.C. § 1341. A jury found Hutul guilty of the conspiracy and nine of the substantive counts.

The evidence and testimony were essentially the same in both the state and federal trials, although additional witnesses were called in the federal trial to offer evidence on essential elements of the alleged federal crimes.[1]

** On August 25, 1977, we dismissed the appeal for want of a final judgment. Thereafter the District Court entered a final judgment and Hutul filed a new notice of appeal and that appeal was redocketed in this Court as No. 78-1015. On February 8, 1978, we ordered the matter submitted for disposition upon the record made in No. 76-1197 and the new appeal No. 78-1015.

[1] We do not burden this opinion with a detailed account of the evidence which was thoroughly discussed by this Court in *United States* v. *Hutul*, 416 F.2d 607 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970).

Hutul's judgment of conviction and sentence to custody for five years was affirmed by this Court in *United States* v. *Hutul*, 416 F.2d 607 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970).[2]

Hutul was in custody until his parole on June 14, 1972, and was discharged on April 15, 1975. The instant § 2255 petition was filed while Hutul was in custody, and the District Court retained jurisdiction following Hutul's release. *Melian* v. *United States*, 515 F.2d 73, 76 (7th Cir. 1975).

Issues on Review:

1. Whether the issue of double jeopardy is properly raised in Hutul's § 2255 petition.

2. Whether Hutul was twice placed in jeopardy for the same offense in violation of the Fifth Amendment when he was prosecuted in federal court after a prior acquittal in state court.

[2] Hutul urged on appeal that because he had been acquitted after the prior state prosecution, principles of res judicata and collateral estoppel barred the subsequent federal prosecution on the same facts. This Court rejected the argument stating, *inter alia*, that because the Federal government was neither a party to the prior prosecution nor in privity with the State of Illinois, the principles of res judicata and collateral estoppel "do not provide a substitute for the defense of double jeopardy." (416 F.2d at 626). Although Hutul had asserted his reliance in the double jeopardy clause in his reply brief, this Court noted:

> "Defendant Hutul does not claim that his Fifth Amendment right against double jeopardy was abridged. Indeed, it is well established that a federal government is not barred by the double jeopardy clause from prosecuting a person for the same acts for which he was previously acquitted in a state court. *Bartkus* v. *Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L. Ed.2d 684 (1959); *Abbate* v. *United States*, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959)." 416 F.2d at 626 n.35.

3. Whether the trial court's mid-trial instruction to the jury that all of the evidence was admitted against each of the defendants was tantamount to a directed verdict of guilty and deprived Hutul of his Sixth Amendment right to trial by jury.

4. Whether the trial court erroneously prohibited introduction of statements impeaching two government witnesses and thereby deprived Hutul of his constitutional right to present a defense.

5. Whether Hutul was denied his Sixth Amendment right to confront the witnesses against him when the Court admitted certain exhibits prepared by persons who did not testify and could not be cross-examined.

Discussion:

Issue 1:

Davis v. *United States,* 417 U.S. 333, 342-47 (1974), teaches that not only claims of constitutional violations but also claims of violations of the "laws of the United States" are cognizable in § 2255 proceedings when the claimed errors were fundamental defects which inherently result in a complete miscarriage of justice.[3]

We cannot say with certainty that this Court in *Hutul* definitively adjudicated Hutul's claim of double jeopardy as distinguished from the issue of res judicata and collateral estoppel. Further, we cannot say from the record that Hutul deliberately bypassed the route of appeal on the double jeopardy issue. Finally, due to the tenor of the District Court's order granting the Government's motion to dismiss, we cannot say that the District Court adjudicated the double jeopardy claim as opposed to the non-cognizability of that issue in a § 2255 proceeding.

[3] The Court of Appeals in *Houser* v. *United States,* 508 F.2d 509 (8th Cir. 1974), contains a full discussion of what is and what is not cognizable in a § 2255 proceeding in light of *Davis. Also see* Justice (Circuit Judge) Stevens' concurring opinion in *Bachner* v. *United States,* 517 F.2d 589, 597-99 (7th Cir. 1975).

Therefore, in order to definitively adjudicate the double jeopardy claim, we assume, without deciding, that the double jeopardy claim is cognizable under the instant § 2255 petition.

Issue 2:

Hutul candidly acknowledges that his claim of double jeopardy arising from the federal prosecution is foreclosed under the rationale of *Bartkus* v. *Illinois,* 359 U.S. 121 (1959), and *Abbate* v. *United States,* 359 U.S. 187 (1959). However, he attacks the present validity of the holdings in those cases with two thrusts. First, he argues that as the result of more recent decisions, "the rule of *Bartkus* [and *Abbate*] is so enfeebled as to lack all binding force." *State* v. *Fletcher,* 22 Ohio App. 2d 83, 259 N.E.2d 146, 152 (1970). Secondly, he argues these cases are distinguishable in that *Abbate* involved a prior state court conviction followed by a federal prosecution for the same offense, and *Bartkus* involved a prior federal acquittal followed by a state conviction, but neither, as in the instant case, involved a state court acquittal followed by a federal prosecution and conviction.

We conclude this second premise to be untenable. The fact that neither *Bartkus* nor *Abbate* involved a state court acquittal followed by a federal prosecution and conviction, as in Hutul's situation, is a difference without legal significance. *United States* v. *Johnson,* 516 F. 2d 209, 212 (8th Cir. 1976), *cert. denied,* 423 U.S. 859 (1975).

In support of his first premise, Hutul also cites: *Benton* v. *Maryland,* 395 U.S. 784 (1969); *Ashe* v. *Swenson,* 397 U.S. 436 (1970); *Waller* v. *Florida,* 397 U.S. 387 (1970); *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964); and *Elkins* v. *United States,* 364 U.S. 206 (1960). The same premise based upon the same authorities was laid to and rejected by the Courts of Appeal for the Sixth and Eighth Circuits in *Martin* v. *Rose,* 481 F.2d 658 6th Cir. 1973), *cert. denied,* 414 U.S. 876 (1973); and *Johnson,* respectively.

After the District Court considered the cause, Hutul's first premise received the fatal blow from *United States* v. *Wheeler*, 98 S.Ct. 1079 (1978). Wheeler discusses *Bartkus* and *Abbate* at length, clearly regarding them as still correctly stating the law, and unequivocally reaffirms the dual sovereignty doctrine which prevents the imposition of the double jeopardy bar.

We conclude that under the teachings of *Wheeler*, Hutul's contention of double jeopardy must be rejected.

Issue 3:

We have perused the record and conclude that the admission of the evidence as to all defendants, as well as the District Court's challenged jury instructions, was free from error. *United States* v. *Allegretti*, 340 F.2d 254, 256 (7th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965); and *Hutul*.

Issues 4 and 5:

We conclude each of these claims to be without merit. *See Hutul*, 416 F.2d at 623-24; *United States* v. *Neff*, 525 F.2d 361, 364 (8th Cir. 1975); *Houser* v. *United States*, 508 F.2d 509, 515 and n.38; *Hutul*, 416 F.2d at 620 n.30; and *United States* v. *Isaacs*, 493 F.2d 1124, 1161 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974).

The District Court's order granting the Government's motion to dismiss Hutul's § 2255 petition and cause is affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

No. 75 C 1179

HARRY P. HUTUL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORDER

This matter, having come before the Court on Petitioner's "Motion for the Entry of an Appropriate Dismissal Order or Other Relief", and the Court having found that:

1. It has jurisdiction over this matter pursuant to the Order of the United States Court of Appeals for the Seventh Circuit in Appeal No. 76-1179, dated August 25, 1977, a copy of which is attached hereto as Exhibit "A".

2. This is an action brought by Petitioner pursuant to 28 U.S.C. §2255 to set aside a judgment of conviction and sentence entered by the United States District Court for the Northern District of Illinois in cause No. 64 CR 408;

3. The late Honorable William J. Lynch, having considered memoranda filed by the parties, entered a minute order (attached hereto as Exhibit "B") on January 19, 1976 granting the Government's Motion to Dismiss on the ground that the Petition failed to state a claim upon which relief could be granted;

4. No separate document was executed granting final judgment in the Government's favor against Petitioner;

5. Petitioner subsequently caused a properly perfected appeal to be filed in the United States Court of Appeals for the Seventh Circuit (Appeal No. 76-1197), subsequent to which briefs were filed, oral argument was given and the case taken under advisement by the Court of Appeals;

6. On August 25, 1977, the United States Court of Appeals for the Seventh Circuit entered an order dismissing the appeal for the reason that the minute order of District Court, from which the appeal was taken, was not a final judgment entered on a separate document as required by Fed. R. Civ. P. 58 and 79(a);

7. A per curium order was entered by the Seventh Circuit (Exhibit A) specifically providing that either party may request the District Court enter an appropriate final judgment on a separate document, and if a timely appeal is taken from any such order, there need be no further briefing or oral argument on appeal; and

8. Petitioner having requested that this Court enter an appropriate final judgment adjudicating this cause;

NOW THEREFORE IT IS HEREBY ORDERED that:

(1) The Motion of the United States of America to dismiss the herein Petition for failure to state a claim upon which relief can be granted shall be, and the same is hereby granted.

(2) This order shall constitute a final order of judgment, set forth on a separate document, as required by Rule 58 of the Fed. R. Civ. P. 58.

(3) Pursuant to Fed. R. Civ. P. 79(a), the Clerk of the District Court is directed to enter in the Civil Docket maintained with respect to this action, the appropriate notation reflecting the herein order, including the date that this order has been entered.

_____

Judge

WILLIAM J. HARTE
111 West Washington Street
Chicago, Illinois 60602
726-5015